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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 139

FRANKLIN PERRY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

MEYER J. SAWYER,
Counsel for Petitioner.

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ANSWER TO RESPONDENT'S BRIEF IN OPPOSITION.

The respondent in its brief assumed that there were only two questions presented to this Court in the petitioner's petition and brief, there are however, three matters of law and of fact presented, to wit:

1. The variance between the allegations in the indictment and the proof.

2. Matter of Jurisdiction, in that there was NO evidence of mailing or of causing the Mails to be used, sufficient to justify the verdict.

3. There was not sufficient evidence of fraud and misrepresentation to justify the court below in having submitted the case to the jury.

Statement.

To get the facts and the law squarely before this Court the petitioner believes that a short statement of the case should be made and in this regard says:

That the State of New Mexico has for many years been leasing oil and gas lands to individuals and corporations

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and that within the last ten years major oil companies have leased and are now holding under lease many millions of acres in this State; that practically all of the Southeastern portion of the State is in the Permian Formation and that from the standpoint of Geology could be productive oil and gas lands; that acreage which sold at one time for a few cents per acre, later sold for thousands of dollars per acre and that many fortunes were made by purchasing land in New Mexico ahead of the drilling and with this in mind the petitioner herein purchased, direct from the State of New Mexico some 2,000 acres of what the State set aside as oil and gas lands, and resold the same to prospective purchasers in small lots and that the Prosecution claims that in selling same petitioner made misrepresentations and the petitioner claims that he sold such acreage solely as speculative and that he represented the same as such and that in every sale the purchaser signed a receipt in which was this clause: "I thoroughly understand that this purchase is speculative". (Defendant's Ex. 3, Tr. 46) and the petitioner claims that his only representations were those obtained from the maps, oil journals and magazines, all of which were being sent through the mails daily and most of which were approved by the sovereign State of New Mexico.

Argument.

1. Variance. The principal allegation in the indictment of misrepresentation is/was that the petitioner represented to prospective buyers that he was selling leases which he had obtained direct from the State of New Mexico, when in truth and in fact he had no such leases, but did have leases which he sold to the persons named in the indictment and that said leases were purchased by petitioner "From an oil lease broker located in Santa Fe". The inference being that the leases were of an inferior value.

The admitted proof is that the petitioner did have State

leases which he purchased direct from the Sovereign State of New Mexico and that he never had, sold, or offered for sale a single acre which was "Obtained from an Oil Broker."

The respondent's brief admits this variance, but claims same to be immaterial. Now the petitioner, as defendant, entered the lower court to meet this main issue and relied upon the falsity of this allegation and the prosecution, by its own witnesses, Piatt (Tr. 16-17) and Schuts (Tr. 31), proved that the defendant purchased and held the oil and gas leases direct from the State of New Mexico and had never had or sold any leases which he had "Purchased and obtained from an oil lease broker located in Santa Fe", therefore the petitioner was taken by surprise and the variance was fatal and the trial court should have directed a verdict for the defendant. In the long experience of the attorney for the petitioner he has never heard of a more complete and a more fatal variance, for the proof was directly opposite to the allegations in the indictment.

2. Jurisdiction. Congress in enacting section 215 of Criminal Code, generally known as the Mail Fraud Section, had in mind cases where persons were induced to purchase goods, wares and merchandise, through the mails, send money as the result of advertisements or letters, for the payment of articles and to either not receive such or to receive inferior goods. We admit that the statute has been expanded to cover almost any case where articles have been sold upon fraudulent representations and the mail in anywise used, but in this case the trial court went far beyond the statute and if such expansion continues no person will be safe in buying or selling through the mails and we believe that this Court should grant the writ of certiorari and establish a precedent for the guidance of Federal Courts.

The prosecution, in this case, does not claim that the petitioner, himself, mailed the letters set forth in the indictment and the proof failed to show that the petitioner was ever in New Mexico or within the jurisdiction of the trial court, but the allegation in the indictment is "*That after the sale of the said oil leases to the victims*, defendant did use and *CAUSE to be used* the Post Office Establishment of the U. S." Mark the words "AFTER THE SALE OF SAID LEASES". The admitted facts are that the petitioner, while in the Commonwealth of Pennsylvania, sold the leases mentioned in the indictment; that petitioner never left the Commonwealth of Pennsylvania; that the petitioner did not know the Commissioner of Public Lands of New Mexico and that there was not one single iota of evidence produced at the trial to show that the petitioner did one act to cause the Commissioner of Public Lands, New Mexico, to do or refrain from doing any act and particularly was there no evidence to show that petitioner ordered, requested or caused the said Commissioner to use the mails. In this connection we are met with a well settled principle of law, to wit: when the prosecution, in a criminal case, has it within its power to produce witnesses, that if produced would prove a necessary and material fact or link in its case and failed to produce and call such witnesses, the presumption is that if such witnesses were called they would testify contrary to the interest of the prosecution or that their testimony would fail to establish the allegation of the indictment.

HERE WE HAVE THE OFFICE OF THE COMMISSIONER OF PUBLIC LANDS OF NEW MEXICO WITHIN THE VERY SHADOW OF THE BUILDING IN WHICH THE TRIAL WAS BEING CONDUCTED AND THE PROSECUTION DID NOT CALL HIM OR ANY MEMBER OF HIS OFFICE TO TESTIFY AND YET THE GOVERNMENT ALLEGED THAT THE DEFENDANT CAUSED THIS COMMISSIONER TO DO THE VERY ACT WHICH IS THE GRAVAMEN OF THE ALLEGED CRIME.

Respondent's brief pages 9 and 10 the pleader says: "The * * * mailing at Santa Fe, * * *, BY THE LAND CO... ISSIONER" and "That the lease * * * had been mailed * * * at Sante Fe, * * *, BY THE COMMISSIONER of Public Lands (R. 20-21, 44)."

The petitioner says that if the Commissioner of Public Lands and all members of his staff had been called they would each and every one have testified that the petitioner had absolutely nothing to do with the mailing of a DUPLICATE COPY of the lease owned by the persons named in the indictment, but would have been forced to have testified that these duplicate copies are always sent to the owners of State Leases, regardless of any influence, because under the laws of the State when a lease is recorded, whether delivered to the Commissioner in person, sent by messenger or through the mails, the Commissioner causes a duplicate copy of such lease to be mailed to the party or parties named in such lease.

In this regard there is another firmly established principle of criminal law, to wit: Where there are two methods of accomplishing an act, one a criminal offense and the other an innocent act, without proof that the criminal method was used the court and jury must find that the accused used the innocent method, because a man is presumed to have done the act innocently unless proven to have done it criminally. Here the original lease was delivered to the Commissioner of Public Lands, with no evidence to show that it was mailed to him by the petitioner or by any person and there is no presumption that it was mailed to him or that the mails were used, if so why was the Commissioner not called to testify that he received the leases through the mails? The Commissioner was just across the street from the Federal Court and the prosecution had it within its power to prove this alleged mailing, if in fact, there was any mailing. In this case we are presuming that the petitioner

mailed the original lease to the Commissioner, again that he instructed the Commissioner to use the mails in sending the duplicate lease to the lessees and again that the Commissioner did actually mail same. Three presumptions without the slightest proof.

The laws of New Mexico require the Commissioner to execute and deliver to all lessees of public lands a DUPLICATE COPY of their lease, but this is not to perfect the lessees' title, it is merely notice to them that the lease has been recorded and if no duplicate copy had been sent to the persons named in the indictment their titles would not have been defeated. This act on the part of the Commissioner is not a part of the sale, it is a memorandum and in no wise affects the title. The title to these leases is like that of any deed or lease, good of record. The recording completes the title and any memorandum made thereafter is not "FOR THE PURPOSE OF (Statute, executing such scheme)" aiding in completing a sale. The sale was made in Pennsylvania, totally consummated there and the persons named in the indictment did not have to have duplicate copies of their leases to complete their titles and where the mails were used after the alleged fraud and not in furtherance thereof and merely incidental, there can be no prosecution under Sec. 215.

Dyhre v. *Hudspeth*, 106 F. (2d) 286;
U. S. v. *Dale*, 230 F. 750;
Bowers v. *U. S.*, 244 F. 641;
Smith v. *U. S.*, 208 F. 125;
Brooks v. *U. S.*, 146 F. 223;
U. S. v. *McCroy*, 175 F. 802.

The gist of the offense is the use or abuse of the mails in perfecting a fraud and not the fraud itself. Federal Courts have no jurisdiction unless the mails are used in furtherance of the scheme to defraud.

Olsen v. *U. S.*, 287 F. 85;
U. S. v. *Jones*, 10 F. 469.

The gist of the offense is the abuse of the mails and the letter itself is the *corpus delicti.* Does the prosecution honestly and sincerely claim that any letter written and mailed by the COMMISSIONER OF PUBLIC LANDS of the Sovereign State of New Mexico, in the line of duty, could be the *corpus delicti* of a crime? No claim is made that the defendant wrote or received any letters, but the only claim is of an ACT DONE BY a reputable officer of one of our sovereign States as a part of the duties of his office. Could such a letter, if proven to have been written at the instance of the defendant, possibly be the *corpus delicti* of a crime, if so, the said commissioner, must be necessarily a party to a crime? The commissioner was in Santa Fe, New Mexico, at the time of the trial, just across the street from the Federal Court. WHY WAS HE NOT CALLED to prove that such a letter was, in fact, written or sent through the mails? The presumption is that no such letter was caused to be sent through the mails by the defendant. And too, the mere mailing of a letter is no evidence of fraud. The letter speaks for itself, in this instance the only alleged mailing was done after the alleged sale had been wholly and entirely consummated. The transaction was complete even without the lease being recorded and the recording is/was merely for the protection of the lessee and did not weaken or better his title.

Dyhre v. *Hudspeth, supra,*
U. S. v. *Mitchell,* 36 F. 493,
Erbaugh v. *U. S.,* 173 F. 433,
McLendon v. *U. S.,* 2 F. (2nd) 660.

The indictment must show that the fraudulent scheme was "To be effected" through the mails, as an essential part, not as a mere adjunct or incident, and that the original design contemplated and embraced this. Certainly the mailing of a duplicate copy of a recorded lease as a part

of the duties of his office is no part of an original design or scheme to defraud.

U. S. v. *Clark,* 121 F. 190.

There is not the slightest question of doubt in this case that the sending of a duplicate copy of a State lease by the Commissioner of Public Lands was a "MERE INCIDENT" in the transaction which the petitioner had with the parties named in the indictment and that the mailing was not a part of any original design to defraud nor was it even contemplated by the petitioner as he either did or could have delivered the leases to the buyers in Pennsylvania at the time of the sales and these persons could have sent same for recording. The leases may have been or could have been carried by methods other than the mails to the Land office for recording and the Commissioner could have, himself, adopted the mails for sending duplicates.

3. NO EVIDENCE OF FRAUD, or devising a scheme to defraud. The facts in this case show plainly that the petitioner purchased from the State of New Mexico leases on what the State claimed were oil and gas lands; that he purchased same direct from the State and sold same under representations that were contained in maps, newspapers and oil journals published in the United States which were daily in circulation through the mails; that his only representations to secure a sale were: that the leases were obtained direct from the State of New Mexico and this was admitted as a fact, although in the indictment claimed to be false; that the lands were on Structure and this too is admitted as all of Southeastern New Mexico is in the Permian basin and is geologically speaking productive territory and the proof showed that major oil companies held millions of acres in this territory in which the leases of petitioner were located; that leases which petitioner had for sale were in active territory and this is mere boosting, salesmanship

talk, not actual misrepresentation; that the lands in the immediate territory would be developed within four months or one year, of course this is a mere opinion and the final alleged misrepresentation is that the buyers could or might make LARGE profits if they purchased leases from the petitioner and the uncontradicted evidence offered by the prosecution's own witness was that the leases purchased for $500.00 could have been sold for $1,000 within a few months after the purchase and this is large profits, 100% within a short time (Tr. p. 27).

In the transcript page 27, the trial court remarked, after most of the testimony was in and regarding the testimony of possibly the most important Government witness, "That the witness has not testified as to any misrepresentations and that the only thing appearing from the witness's statement was that the defendant had indulged in SALESMANSHIP TALK, THAT IT WAS JUST BOOSTING TALK." And the petitioner says that in the entire record there is not a scintilla of evidence that goes beyond allowable salesmanship and boosting, it is not even gross exaggeration. The brief of the respondent says, speaking of the representations made by the petitioner to induce sales, "In any event, as the court below stated (R. 57-58), 'UNDOUBTEDLY, the representations made by the defendant WERE HIGHLY EXAGGERATED.'"

> A salesman opens his mouth wide and the buyer closes his mouth tight, are either to be condemned for driving a close bargain?

A false representation does not amount to fraud unless it be made with fraudulent intent.

Yusem v. *U. S.*, 8 F. (2nd) 6.

Knowledge and belief as to the falsity of a representation must be shown. Petitioner relying upon representations made by a sovereign State, to-wit that the leases were on lands likely to be productive oil and gas lands

and that major oil companies had leased and were holding as oil and gas lands millions of acres of land in and near the leases which petitioner was selling and that the leases were in the Permian Structure, surely would be justified in representing all that is alleged in the indictment as his belief.

Bentel v. *U. S.*, 13 F. (2nd) 327,
Corliss v. *U. S.*, 7 F. (2nd) 455,
Rudd v. *U. S.*, 173 F. 914,
Harrison v. *U. S.*, 200 F. 662,
Horn v. *U. S.*, 182 F. 721,
Sandals v. *U. S.*, 213 F. 569,
McDonald v. *U. S.*, 241 F. 793,
Moore v. *U. S.*, 2 F. (2nd) 904,
Gold v. *U. S.*, 36 F. (2nd) 16,
Stunz v. *U. S.*, 27 F. (2nd) 575.

Conclusion.

This Court should allow the writ of certiorari to review the judgment of the lower court as there was no jurisdiction, a fatal variance, no evidence of fraud or devising a scheme to defraud and lastly there was absolutely no evidence to show that the petitioner caused the mails to be used and unless this Honorable Court admits a review of the law and the facts as they show from the transcript this petitioner will suffer the ignominy of being convicted of a crime when in truth and in fact he is not guilty thereof.

Respectfully submitted,

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